

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

**FEDERAL DEPOSIT INSURANCE
CORPORATION, as Receiver of Heritage
Community Bank,**

Plaintiff,

v.

**JOHN M. SAPHIR; PATRICK G. FANNING;
STEPHEN L. FAYDASH; WILLIAM E.
HETLER; THOMAS JELINEK; LORI A.
MOSELEY; STEPHEN ANTHONY;
JERRY C. BRUCER; JAMES K. CHAMPION;
ANDREW B. NATHAN; and MARY C. MILLS,**

Defendants.

Case No. 10-cv-7009

JURY DEMANDED

Judge Rebecca Pallmeyer

**DEFENDANT JOHN M. SAPHIR'S
MOTION FOR LEAVE TO FILE DOCUMENT UNDER SEAL**

Pursuant to Federal Rule of Civil Procedure 26 and Local Rule 26.2, defendant John M. Saphir respectfully moves for an order permitting him to file a confidential document under seal in support of his Motion to Dismiss the FDIC's Complaint, filed on January 24, 2011. The grounds supporting this motion are set forth below.

1. The FDIC has brought claims for gross negligence, negligence and breach of fiduciary duty against eleven former directors and officers of Heritage Community Bank, including the former CEO, John M. Saphir.

2. Defendant Saphir and other Defendants are moving to dismiss the Complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). Defendant Saphir moves for leave to file under seal a Report of Examination of Heritage

Community Bank dated as of June 30, 2006, and delivered to the Heritage Board of Directors pursuant to a letter dated November 20, 2006. This document is critical to Saphir's Motion to Dismiss because the crux of the FDIC's Complaint is that by December 1, 2006, Defendants should have known that Heritage's commercial real estate ("CRE") loan portfolio was in trouble and that Defendants should have ceased all CRE lending and increased Heritage's loan loss reserves by an unspecified amount. See Saphir's Memorandum in Support of Motion to Dismiss FDIC's Complaint ("Saphir's Brief") at p. 1 (filed Jan. 24, 2011). The Complaint also generally alleges that Defendants owed a duty to correct "deficiencies identified in Reports of Examination performed by state and federal bank examiners."

3. The FDIC's Complaint fixes the key date for determining Defendants' liability and notice of alleged problems as of December 1, 2006. On November 20, 2006, the examiners mailed a copy of the Report of Examination as of June 30, 2006 to the Heritage Board. That document is critical to refute the FDIC's allegations that the Heritage Directors should have known of problems in the CRE portfolio by December 1, 2006.

4. Saphir's Brief establishes that the specific documents the FDIC points to in the Complaint that allegedly gave notice to Defendants – the Uniform Bank Performance Reports for the quarters ending March 31, June 30, and September 30, 2006 – directly refute the FDIC's allegations. See Saphir's Brief at pp. 3-4, 11, and Exs. A to D thereto.

5. Because the Complaint also references and relies upon reports of examination by the regulators that allegedly gave notice of deficiencies to Defendants,

Defendants may rely upon such documents in support of their motions to dismiss. *E.g.*, *Hecker v. Deere & Co.*, 556 F.3d 575, 582 (7th Cir. 2009).

6. The 2006 Report of Examination states on its face that it is confidential supervisory information under Section 48.3 of the Illinois Banking Act, 205 ILCS 5/48. Counsel for Saphir received a copy of the 2006 Report of Examination from FDIC's counsel when FDIC's counsel marked that document as an exhibit at the deposition of Saphir in the administrative investigation.

7. Counsel for the parties in this case have been discussing the terms of a proposed protective order, but that proposal is not yet finalized in a form to be presented to the Court for entry. Accordingly, Saphir is filing this motion so that this confidential 2006 Report of Examination may be filed under seal and considered in connection with Saphir's Motion to Dismiss.

WHEREFORE, Defendant John M. Saphir respectfully requests leave to file under seal the Report of Examination of Heritage Community Bank as of June 30, 2006, in support of his Motion to Dismiss.

January 24, 2011

Respectfully submitted,

/s/ John M. George, Jr.

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